

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR08-236

ALFRED LEWIS SUMMERVILLE
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered October 1, 2008

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT,
[NO. CR2007-252-I]

HONORABLE JOHN HOMER
WRIGHT, JUDGE

AFFIRMED

WENDELL GRIFFEN, Judge

Alfred Lewis Summerville pleaded guilty to rape and agreed to be sentenced by a Garland County jury. After hearing evidence, the jury sentenced him to a forty-year term in the Arkansas Department of Correction. Appellant asks this court to reverse and remand for re-sentencing, alleging that the trial court erred in allowing evidence of rapes other than the one for which he pleaded guilty. We affirm, as (1) appellant cannot show prejudice from the sentence he received and (2) the evidence in question was admissible.

The victim was appellant's stepdaughter, fourteen-year-old M.W. According to M.W., she was twelve when appellant and her mother began dating. The initial relationship between appellant and her was legitimate, but eventually appellant began going to her room and having sexual intercourse with her. Appellant had sex with M.W. two or three times a week before he and her mother married. After the wedding, appellant raped M.W. once a week. M.W. also testified about a rape that occurred on May 6, 2007. Dr. Karen Farst, a pediatrician with the University of Arkansas

for Medical Sciences, examined M.W. on May 8, 2007, and discovered evidence of an old, penetrating genital injury. She could give no opinion as to the date of the injury, but she stated that damage occurred before May 6, 2007.

Prior to the October 4, 2007 sentencing hearing, appellant filed a motion in limine to preclude evidence of instances when he raped the victim other than the one on May 6, 2007, the one to which he pleaded guilty. He argued that such evidence was inadmissible under Rule 404(b) of the Arkansas Rules of Evidence and that the admission could do nothing more than inflame the jury. The State argued that Rule 404(b) was inapplicable during the sentencing phase and that it would not have operated to exclude the evidence in a guilt phase, as the previous rapes involved the same victim and a course of conduct. The court agreed with the State and denied appellant's motion. After the close of evidence, the jury deliberated and sentenced appellant to a forty-year term of imprisonment.

Appellant challenges the admissibility of evidence of rape prior to May 6, 2007. As he did at trial, he contends that the trial court should have excluded the evidence pursuant to Rule 404(b) of the Arkansas Rules of Evidence. He further argues that the sole purpose of the evidence was to inflame the jury.

We affirm, as appellant is unable to show prejudice. Rape is a Class Y felony, *see* Ark. Code Ann. § 5-14-103(c) (Repl. 2006), which carries a sentencing range of ten to forty years or life. *See* Ark. Code Ann. § 5-4-401(a)(1) (Repl. 2006). Here, the jury sentenced appellant to a forty-year term of imprisonment, which is less than the maximum sentence he could have received, life. *See also Tate v. State*, 367 Ark. 576, 242 S.W.3d 254 (2006) (holding that a first-degree-murder defendant, who received a forty-year term of imprisonment, could not show how he was prejudiced by the sentence because he received less than the maximum sentence possible for the conviction). A defendant who

has received a sentence within the statutory range short of the maximum sentence cannot show prejudice from the sentence. *Id.*

Alternatively, we affirm on the merits of appellant's argument. The admissibility of evidence is reviewed under the abuse-of-discretion standard. *See, e.g., Young v. State*, 370 Ark. 147, 257 S.W.3d 870 (2007). Relevant evidence at a sentencing hearing includes relevant character evidence, evidence of aggravating and mitigating circumstances, and evidence relevant to guilt presented in the first stage of trial. Ark. Code Ann. § 16-97-103(5), (6), (7) (Repl. 2006). The evidence introduced during the sentencing phase must be governed by the rules of admissibility and exclusion; otherwise, sentencing proceedings would not pass constitutional muster. *Walls v. State*, 336 Ark. 490, 986 S.W.2d 397 (1999); *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994).

The evidence of prior rapes was admissible for multiple reasons. First, while appellant asserts that evidence of previous rapes was inadmissible under Rule 404(b), he ignores the "pedophile exception," which allows evidence of similar acts with the same or other children when it is helpful in showing a proclivity for a specific act with a person or class of persons with whom the defendant has an intimate relationship. *See, e.g., White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006); *Hamm v. State*, 365 Ark. 647, 232 S.W.3d 463 (2006). The uncharged rapes would have been admissible during the guilt phase; they were equally admissible during sentencing.

Further, evidence of uncharged misconduct is admissible as an aggravating factor during the sentencing phase. An aggravating factor is "any circumstance attending the commission of a crime . . . which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime . . . itself." *Hill, supra*, (citing "aggravation," *Black's Law Dictionary* 712 (6th ed. 1990)). While evidence of previous rapes was not at issue as it pertained to appellant's guilt, the jury was entitled to consider the evidence to affix appellant's sentence. *See also*

Williams v. State, 363 Ark. 395, 214 S.W.3d 829 (2005) (holding that evidence of a subsequent rape was admissible during sentencing as relevant character evidence and aggravation evidence); *McClish v. State*, 331 Ark. 295, 962 S.W.2d 332 (1998) (holding that evidence of a prior deferred sentence in Oklahoma and plea of no contest to rape was admissible for sentencing purposes).

Affirmed.

HART and HUNT, JJ., agree.